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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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OCT 26 PAGE

No. 90-113

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

CLINCHFIELD COAL COMPANY,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR AND JOHN A. TAYLOR,

Respondents.

MOTION TO PROCEED IN FORMA PAUPERIS

Martin D. Wegbreit, Esquire
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Counsel for Respondent

No. 90-113

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

CLINCHFIELD COAL COMPANY, *
*
Petitioner, *
*
v. *
*
DIRECTOR, OFFICE OF WORKERS' *
COMPENSATION PROGRAMS, UNITED *
STATES DEPARTMENT OF LABOR AND *
JOHN A. TAYLOR, *
*
Respondents. *
*
****

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, John Taylor moves the Court for an order permitting him to proceed in this court, in forma pauperis, pursuant to the provisions of Title 28 United States Code, Section 1915 and Rule 46 of the Rules of this court and in support thereof attaches his affidavit. Mr. Taylor was allowed to proceed in forma pauperis before the United States Court of Appeals for the Fourth Circuit.

JOHN A. TAYLOR
-By Counsel-

Martin D. Wegbreit, Esquire
Client Centered Legal Services
of Southwest Virginia, Inc.
P. O. Box 147
Castlewood, Virginia 24224
(703) 762-5501
Counsel for Respondent

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, John A. Taylor, being first duly sworn, depose and say that I am the respondent in the above styled case; that in support of my motion to proceed in forma pauperis, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I was granted leave to proceed in forma pauperis in the United States Court of Appeals for the Fourth Circuit.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this matter are true:

(1) Are you now employed? yes____ no_X__ self employed?____

(a) Name and address of employer_____

(b) If YES, How much do you earn per month? _____

(c) If NO, Give month and year of last employment __1972___

(d) How much did you earn per month? __$800.00 per month__

(2) If married, is your spouse employed? Yes____ No N/A

(a) If YES, How much does your spouse earn per month? _____

(b) If a minor child under age 21, what is your parents' or guardians' approximate monthly income? ___ _____

(3) Have you received within the past 12 months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends, retirement or annuity payments or other income? Yes_X_ No___

(a) If YES, give the amount received and identify the sources.

Received	Source
$510.00	Soc. Sec. Disability Benefits
_____	_____
_____	_____

(4) Have you any cash on hand or money in checking or savings accounts? Yes____ No X

(a) If YES, Give total amount._____

(5) Do you own any real estate, stocks, bonds, notes, automobiles, or other property (excluding ordinary household furnishings and clothing)? Yes____ No____

(a) If YES, Give value and decription

Value	Description
$4,200	House, 4 room - wood frame
$ 700	1980 Ford
$ 500	1979 Chevrolet Pickup Truck

(6) What is your marital status?

Single___ Married___ Widowed___ Separated___ Divorced X

(a) Total number of dependents. Self

(b) List the people you actually support and your relationship to them.

_____

_____

(7) What are your debts and monthly bills? List all creditors, including banks, loan companies, charge accounts, etc.

Creditor/Monthly bill	Monthly payment	Total bill
Burial Insurance	$ 18.30	_____
Rent or mortgage	_____	_____
House Insurance	$ 30.00	$360/yr.
Automobile Insurance	$ 50.00	$600/yr.
Electricity	$ 50.00	_____
Gas-cooking	$ 10.00	_____
Heat	_____	$500/yr.
Water	$ 37.75	_____
Telephone	_____	_____
Food	$ 200.00	_____
Clothing	$ 20.00	_____
Laundry & Cleaning	$ 25.00	_____
Medical	$ 40.00	_____
Transportation	$ 30.00	_____
Furniture Payment	$ 50.00	$300+
TOTAL	$ 561.05	

I do not pay all my bills every month.

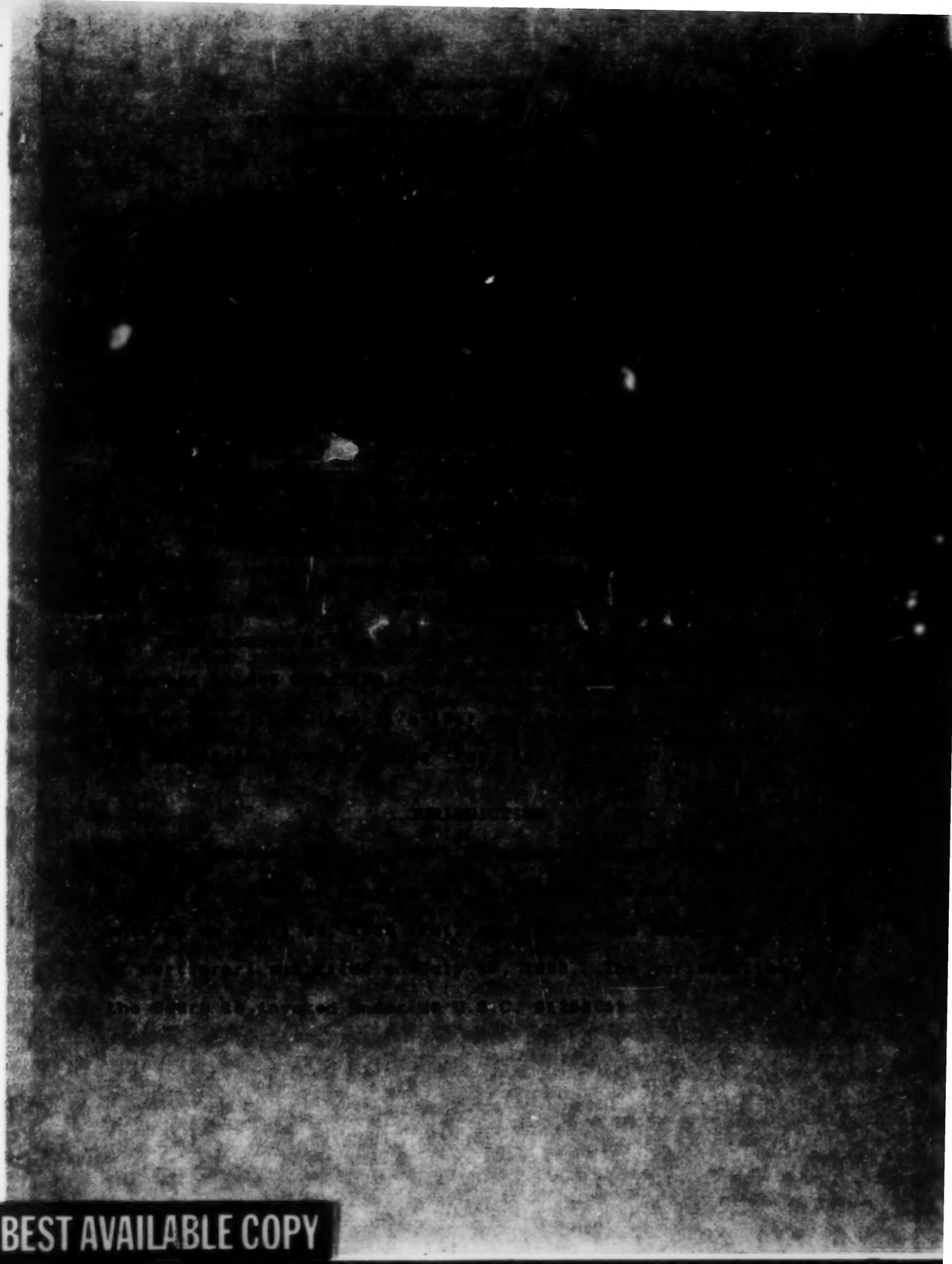
I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

John A. Taylor

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 15th DAY OF August, 1990.

Notary Public

My Commission expires: 10-16-92.



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QUESTIONS PRESENTED

1. Whether the two additional rebuttal methods found in the Department of Labor interim regulations, 20 C.F.R. §727.203(b), violate Congress' mandate in Section 402(f)(2) of the Black Lung Benefits Act of 1972 that the Department of Labor regulations not be more restrictive than the Department of Health, Education and Welfare (HEW) Social Security interim regulations, 20 C.F.R. §410.490, applicable to claims filed on or before June 30, 1973.

2. Whether the directive of Congress that the Department of Labor interim regulations not be more restrictive than the HEW interim regulations is permissible under the due process clause of the Constitution.

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No. 90-113

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

CLINCHFIELD COAL COMPANY, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, AND JOHN A. TAYLOR, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION
TO THE PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-16a) is reported at 895 F.2d 178. The decision and order of the Benefits Review Board (Pet. App. 17a-19a) and the decision and order of the administrative law judge (Pet. App. 20a-32a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1990. The order denying the petition for rehearing was entered on April 20, 1990 (Pet. App. 1a). The petition for writ of certiorari was filed on July 17, 1990. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

1. The Black Lung Benefits Act of 1972, 30 U.S.C. §901 et. seq., provides benefits to former coal miners and designated survivors for total disability or death due to their pneumoconiosis. Claims filed prior to June 30, 1973 were decided by the Department of Health, Education, and Welfare (HEW) under regulations which contain 20 C.F.R. §410.490. Pet. App. 40a-42a. Congress amended the Act several times in an effort to increase the approval rate of claims. These amendments transferred responsibility for the Black Lung Program to the Department of Labor. The Secretary of Labor was instructed to promulgate his own regulations with the proviso that with regard to claims filed before the institution of the Department of Labor permanent regulations, these regulations could not be more restrictive than the HEW regulations applied to claims filed before June 30, 1973, 30 U.S.C. §902(f)(2). Pet. App. 36a.

The Secretary of Labor in an effort to comply with this directive issued his interim regulations. These regulations include an interim presumption and rebuttal provisions, 20 C.F.R. §727.203. Pet. App. 43a-45a. This regulation has five categories of medical evidence which may be used to invoke the presumption that a miner with more than ten years of coal mine employment is totally disabled by pneumoconiosis arising out of his coal mine employment. The HEW interim regulation contained two categories of medical evidence and did not require proof of ten years of coal mine employment. Because of the requirement of ten years of coal mine employment the Labor interim presumption

provision was found to violate 30 U.S.C. §902(f)(2). Pittson Coal Group v. Sebben, 488 U.S. 105 (1988).

In addition to the invocation issue addressed in Sebben, the Labor interim regulation also contains more restrictive rebuttal provisions. The HEW interim regulation contained only two methods of rebuttal while the Labor interim regulation has four methods of rebuttal.

2. Mr. Taylor applied for Black Lung Benefits in 1976 after twelve years as a coal miner. Pet. App. 6a, 24a. The deputy commissioner found that he was eligible for benefits and named Clinchfield Coal Company as the responsible operator. Clinchfield contested the claim and requested a hearing before an administrative law judge. Pet. App. 5a. The administrative law judge found that Mr. Taylor had invoked the interim presumption of total disability from pneumoconiosis arising out of his coal mine employment but that Clinchfield had rebutted that presumption by showing that Mr. Taylor was not totally disabled from pneumoconiosis[1] and that he did not suffer from

---

[1] As the court of appeals correctly noted in a footnote to its opinion, the administrative law judge applied an incorrect standard to his finding of (b)(3) rebuttal; and therefore, this finding is not supported by substantial evidence:

> In this case, the ALJ determined that the evidence established that Taylor does not have pneumoconiosis, nor was he totally disabled from the disease. From that finding, the ALJ concluded that the presumption was rebutted under § 727.203(b)(3) and (4).
>
> Rebuttal under § 727.203(b)(3), however, is accomplished by showing that claimant's total disability "did not arise in whole or in part out of coal mine employment." So, the conclusion drawn by the ALJ from his findings of fact will not support a

pneumoconiosis. Pet. App. 5a, 31a. So, the administrative law judge denied the claim. Pet. App. 31a. The Benefits Review Board affirmed this decision finding that the denial was supported by substantial evidence. Pet. App. 18a-19a.

3. The court of appeals remanded this case to the Benefits Review Board for further remand to an administrative law judge with instructions to apply the proper standard to the causation issue. Pet. App. 5a, 15a. This case was not reversed. The court of appeals found that the rebuttal provision under 20 C.F.R. §727.203(b)(4) violated 30 U.S.C. §902(f)(2). Pet. App. 13a, 14a. It also noted that the HEW interim regulation on its face did not allow for a causation rebuttal. Pet. App. 13a. The court did note, however, that 20 C.F.R. §410.416 provides for a causation rebuttal therefore it remanded the case for consideration under the proper standard. Pet. App. 14a-15a. In addition, the administrative law judge had not applied the correct standard in finding rebuttal under 20 C.F.R. §727.203(b)(3). Pet. App. 5a-6a.

Chief Judge Ervin dissented.- Pet. App. 15a-16a. He noted that the majority decision was in conflict with both the Sixth Circuit, Youghiogheny and Ohio Coal Co. v. Milliken, 866 F.2d 195 (6th Cir. 1989), and the Third Circuit, Bethenergy Mines, Inc. v. Director, OWCP and Pauley, 890 F.2d 1295 (3rd Cir. 1989). He

---

finding of rebuttal under (b)(3) as to causation. That finding is quite obviously erroneous as a matter of law.

Taylor v. Clinchfield Coal Company, 895 F.2d, 178, 179 (4th Cir. 1990) footnote 1.

concluded that he would affirm the denial of benefits because to do so would avoid potential due process problems. Pet. App. 16a.

ARGUMENT

This court should not grant the petition for writ of certiorari in this case. While it is true that the Circuits are split on the validity of the Department of Labor interim presumption rebuttal provisions, this is not the case with which to resolve this conflict. There are three factors which mitigate against review of this case. First, as noted by the Director in his reply brief, this case is in an interlocutory posture. Second, because this case deals with arterial blood gas studies, it could be disposed of without resolving the issue in cases where the presumption is invoked by ventilatory studies or X-rays. Third, the due process question was not raised by Clinchfield in the court of appeals.

The Court of Appeals for the Fourth Circuit remanded this case for reconsideration of the causation rebuttal finding. While it found that the (b)(4) rebuttal provision was invalid, the finding on (b)(3) is not clear. This case could be resolved by allowing the administrative process to reconsider the evidence in light of the court of appeals decision. Since this case is in an interlocutory posture, this should counsel against review at this time. See, American Construction Co. v. Jacksonville T. & K.W.R. Co., 148 U.S. 372, 384 (1893) (review of interlocutory order inappropriate "unless it is necessary to prevent

extraordinary inconvenience and embarrassment in the conduct of the cause").

While the Director acknowledges this impediment to review by this Court, he offers no reason for deviating from established practice in this case. The Director, in an effort to convince the court that the remand is without effect, cites two cases which the court of appeals decided after this case, Robinette v. Director, OWCP, No. 88-1144 (4th Cir. Apr. 27, 1990), petition for cert. pending, No. 90-172 (filed July 25, 1990), Krahel v. Consolidation Coal Co., No. 89-2394 (4th Cir. Apr. 5, 1990) (unpublished). Notwithstanding the court's rejection of both methods of rebuttal in these two cases, the court of appeals did not issue that decision in Taylor. It does not follow that the Benefits Review Board can do nothing on remand but award benefits.

This Court need not resolve the conflict in the Circuits concerning the validity of the (b)(3) and (b)(4) rebuttal methods in all cases to decide this case. Because Mr. Taylor invoked the interim presumption found at 20 C.F.R. §727.203(a)(3) on the basis of qualifying arterial blood gas studies, the opponents to his claim can argue that the rebuttal provisions under the HEW interim regulation may not be applied to his claim.. This is true because the interim HEW presumption could only be invoked by qualifying X-rays or ventilatory studies. If this Court accepted the argument that the rebuttal provisions must be tied to the invocation provisions, it could dispose of this case without ever reaching the issue at the core of the conflict. Only a case, in

which the claimant invoked the presumption on the basis of x-ray evidence, such as Bethenergy Mines, Inc. v. Director, OWCP and Pauley, 890 F.2d 1295 (3rd Cir. 1989), petition for cert. pending No. 89-1714 (filed May 7, 1990), would allow the Court to quickly and expeditiously deal with this issue in all the cases.

Also, Clinchfield did not raise the constitutional issue before the Fourth Circuit; therefore, the court of appeals did not address the question. The due process issue is one that is unlikely to be resolved by the Taylor case.

Clinchfield has asked the Court to take review in this case and three others currently pending before the court and consolidate them for briefing and argument. Petitioner Taylor opposes the motion for consolidation. The Court need not accept all the cases in order to decide the issue. Granting review and consolidating these cases, as urged by the petitioner, would be extremely unmanageable for the Court and unduly burdensome for the parties, involving a multitude of issues and at least nine separate parties with counsel scattered half way across the country.

CONCLUSION

The petition for a writ of certiorari should either be denied, or held and disposed of as appropriate in light of the disposition of Bethenergy Mines, Inc. v. Director, OWCP and Pauley, No. 89-1714.

JOHN A. TAYLOR
-By Counsel-

Martin Wegbreit, Esquire
Client Centered Legal Services
of Southwest Virginia, Inc.
P. O. Box 147
Castlewood, Virginia 24224
703-762-5501

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

CLINCHFIELD COAL COMPANY,	*	
	*	
Petitioner,	*	
	*	
v.	*	No. 90-113
	*	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,	*	
	*	
and	*	
	*	
JOHN A. TAYLOR,	*	
	*	
Respondents.	*	
	*	

****

CERTIFICATE OF SERVICE

I, Martin Wegbreit, Esquire, a member of the bar of this court do hereby certify that pursuant to Rule 29 of the Rules of this Court that on this 27th day of September, 1990, a copy of the Brief in Opposition Opposition to the Petition for Writ of Certiorari in the above captioned case was served by U.S. mail, postage prepaid, on:

Mark E. Solomons
Arter & Hadden
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006
202-775-7154

Christopher J. Wright
Office of the Solicitor General
Department of Justice
Washington, D.C. 20530
202-514-2217

by depositing true copies of the same in the United States Post Office, Castlewood, Virginia, with first class postage prepaid.

Martin Wegbreit, Esquire
Client Centered Legal Services
of Southwest Virginia, Inc.
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September 27, 1990

Joseph F. Spaniol, Jr., Clerk
Supreme Court of the United States
1 First Street, N.W.
Washington, D.C. 20543

Re: Clinchfield Coal Co. v. Director, OWCP and John A. Taylor, Petition for a Writ of Certiorari from the United States Court of Appeals for the Fourth Circuit, # 90-113.

Dear Mr. Spaniol:

Enclosed please find the original of the following documents which I wish to file in the above-styled action:

(1) Motion to Proceed In Forma Pauperis, with attached Affidavit,

(2) Brief in Opposition to the Petition for Writ of of Certiorari, with attached Certificate of Service.

Kindly file these with the Court and send your acknowledgement of receipt of them.

Please bring the Motion to Proceed In Forma Pauperis to the attention of the Court for its consideration.

Thanking you for your cooperation and assistance, I am,

Sincerely,

Martin Wegbreit
Senior Staff Attorney

MW/jbv

Enclosures

cc: Mark E. Solomons, Esq.
Christopher J. Wright, Esq.

RECEIVED
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